SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970
No. 1174

UNITED TRANSPORTATION UNION,
LOCAL LODGE NO. 31,

Petitioner,

v.

ST. PAUL UNION DEPOT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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LOCAL LODGE NO. 81,

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v.

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OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, is unofficially reported at 75 LRRM 2595 and 64 CCH Lab. Cas. ¶ 11,272 and appears in Appendix A to the petition for certiorari. The findings of fact, conclusions of law, and judgment of the district court are unofficially reported at 74 LRRM 2161 and 62 CCH Lab. Cas. ¶ 10,830 and appear in Appendix B to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1970. The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a railroad may discontinue job assignments pursuant to an established practice in which its employees and their union have previously acquiesced during the pendency of a union proposal to change or abolish the practice.

STATUTES INVOLVED

The statutes involved are the "*status quo*" provisions of the Railway Labor Act—

Section 5 (45 U.S.C. § 155) in relevant part:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, *no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.*" (Emphasis added.)

Section 6 (45 U.S.C. § 156):

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the begin-

ning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon* as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis added.)

Section 10 (45 U.S.C. § 160) in relevant part:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .

"After the creation of such board and for thirty days after such board has made its report to the President, *no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.*" (Emphasis added.)

STATEMENT

This case involves the question whether a railroad union can compel a railroad to discontinue a long-established practice in which the union has acquiesced, simply by serving a notice *proposing* the abolition of the practice. In the courts below, petitioner union sought an injunction to prohibit the St. Paul Union Depot Company from abolishing certain assignments pursuant to long-established practice during the pendency of a proposal by the union to abolish the practice. The courts below denied the injunction. The relevant facts are as follows:

Respondent St. Paul Union Depot Company ("Depot") conducts switching and terminal operations in St. Paul, Minnesota (Pet. 22-23). Petitioner United Transportation Union ("UTU") represents switchtenders at the Depot (Pet. 22). The parties stipulated and the District Court found that "there has been, over a long period of time, an established practice on the [Depot's] property under which job assignments have been discontinued," and there has never been "a practice, understanding or a written collective agreement . . . requiring negotiations, consent or agreement with the [UTU] to abolish, annul, or cancel established jobs." The established "practice was known to and acquiesced in and not objected to by the employees or their organization." (Pet. 25.) In recent years, the Depot has discontinued switchtender assignments at Shanties 2, 4, 5, 6 and 8 pursuant to the established practice (Pet. 24-25).

Desiring to change the *status quo* in this respect, the UTU served the Depot with a notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156) on January 9, 1970, requesting the Depot to agree that it would "not abolish, annul or cancel

any assignments or jobs without negotiation or agreement" with the UTU (Pet. 23-24). On January 19, 1970, in accordance with Section 6, representatives of the Depot and the UTU conferred with respect to the UTU notice, but no agreement was reached. That same day, the Depot served the UTU with a counternotice requesting the elimination of all "agreements, rules, regulations, interpretations and practices which limit the right of the carrier to establish and abolish yard service and yard service assignments." On February 16, 1970, the parties conferred with respect to the Depot's notice, but again no agreement was reached. On March 30, 1970, the UTU invoked the mediatory services of the National Mediation Board with respect to the UTU notice. (Pet. 24.)

In the meantime, as a result of a change in business activity at the Depot, the need for a section of track 1600 feet in length was eliminated and the track was removed. As a result, certain switches were no longer needed and likewise were removed. Those switches had been tended at Shanty 10 by one switchtender during each of the three shifts each day. Because there was no longer any work to be done tending the switches, the Depot, on April 9, 1970, announced that the switchtenders' assignments at Shanty 10 would be discontinued the following day. (Pet. 23, 24.)

Elimination of the assignments was temporarily restrained when the UTU filed the complaint in this case. One week later, however, Chief Judge Devitt vacated the restraining order, denied the UTU's motion for preliminary and permanent injunctive relief, and granted the Depot's motion for summary judgment (Pet. 26-27).

In granting judgment for the Depot, the district court concluded that under the Railway Labor Act *both* parties must abide by the *status quo* during the pendency of a proposal to

change it; that at the time the UTU served its notice established practices in which the union had acquiesced permitted the Depot to discontinue switchtender assignments without restriction; and that if the UTU wished to change the *status quo* in that respect it was obliged first to exhaust the procedural requirements of the Railway Labor Act (Pet. 26).

On appeal, the Eighth Circuit affirmed. In an opinion by Judge Lay, the court held that "established practices" are part of the *status quo* that is "frozen"—that both parties must accept—during the pendency of a "major" dispute over proposals to change the *status quo*, and thus that the UTU could not compel the Depot to discontinue its established practices with respect to the termination of unneeded assignments simply by serving a proposal to abolish the practices in question. By "established practice" the court meant conduct in circumstances evidencing "some kind of mutual understanding, either express or implied" (Pet. 19), stating that:

> "We would agree that the prior occurrences of similar conduct should not be considered a *per se* 'practice' or 'working condition' under the Railway Labor Act. We think that an 'established practice' under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement." (Pet. 18.)

In support of its conclusions, the court relied on the statutory *status quo* provisions, which refer explicitly to "established practices" and "conditions" (Pet. 16-17). In addition, the court stated that "[i]t cannot be doubted" that if the parties' collective bargaining agreement had expressly given the Depot the right to abolish assignments unilaterally, that right would continue to exist, after the service of a Section 6 notice to

change the agreement, until the agreement was changed; and concluded that "[t]he fact that the right is established as an accepted 'practice,' rather than by express agreement," does not alter the situation (Pet. 20-21). These conclusions were supported by numerous decisions (Pet. 16-21), including *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In that case this Court held that a railroad had violated the statutory *status quo* requirement by changing its previous practice of having all employees report to work at Toledo, during the pendency of a union Section 6 notice proposing an agreement that would have required continuation of that practice, but the Court made it clear that the railroad's action would not have violated the Act if assignments at reporting points away from Toledo "had occurred" prior to service of the Section 6 notice "for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." 396 U.S., at 154 (emphasis added). (Pet. 18.)

ARGUMENT

There is no occasion for further review. The UTU's only reason for claiming that this Court should hear the case is that the decision below allegedly conflicts with *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In that connection, the UTU charges that the court below "expressly ignored" the *Shore Line* decision (Pet. 8). In fact, however, the court below relied upon *Shore Line*, rather than ignoring it. Far from conflicting with *Shore Line*, either in holding or in principle, the decision below is supported by it. The legal premises upon which the decision below was based are clearly correct. There is no conflict among the circuits. That leaves for consideration only petitioner's contentions as to the par-

ticular facts of this case, a matter not appropriate for review by this Court and as to which there was no error below.[1]

1. There is no conflict between the decision below and this Court's decision in *Shore Line*. In *Shore Line*, this Court held that a railroad had violated the *status quo* provisions of the Railway Labor Act by *departing* from its previous practice of having employees report to work at Toledo during the pendency of a union Section 6 notice proposing *continuation* of that practice. The court below held that a railroad did not violate the Act by *refusing* to discontinue its established practice of terminating unneeded assignments without first consulting the union during the pendency of a union notice proposing to *change* that practice. Obviously, there is no conflict between the holding in *Shore Line* and the holding below.

Nor is there any conflict in principle—any conflict in the legal premises upon which the two decisions are based. Both are founded upon the premise that during the pendency of a "major" dispute over changes in the *status quo* desired by one party or the other, the Railway Labor Act requires *both* parties to abide by the existing *status quo*. That is, if a railroad or a union desires to change an existing condition—the practice of having all employees report to work in Toledo *(Shore Line)* or the practice of discontinuing unneeded assignments

[1] At the outset, we note that in its statement of the questions presented (Pet. 3-4) petitioner asserts that the question is whether the railroad was "subject to" the *status quo* requirements of the Railway Labor Act following service of parties' Section 6 notices. That question is *not* presented, however, for the Depot agrees that both parties were subject to the statutory *status quo* requirements following service of the notices, and the court below decided the case upon that basis (Pet. 18). The question decided below—and therefore the only question that could properly be presented here—is the question stated at the beginning of this brief in opposition—in substance, whether the *status quo* provisions of the Act required the Depot to *discontinue* the established practice regarding the elimination of unneeded job assignments, following service of the parties' Section 6 notices.

without negotiation (this case)—the party desiring the change must abide by the *status quo* until major dispute procedures are concluded. That obligation is phrased in various ways in the statutory provisions applicable during the successive steps in the major dispute procedures—as an obligation not to "change" "*established practices* in effect prior to the time the dispute arose" (§ 5, emphasis added), or to "alter" "rates of pay, rules, or working conditions" (§ 6), or to "change" the "conditions out of which the dispute arose" (§ 10). But "the intent and effect of each" of these provisions "is identical so far as defining and preserving the *status quo* is concerned." 396 U.S., at 152. "The obligation of *both* parties during a period in which any of these *status quo* provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions *and practices*, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S., at 152-153 (emphasis added).

Therefore, when a railroad desires to change a previous practice that affects its employees and a union objects—the situation in *Shore Line*—the railroad cannot compel the union to accept the proposed change pending exhaustion of major dispute procedures. And when the shoe is on the other foot, as it is in this case—when it is the union that seeks a change in an established practice that previously was "satisfactorily tolerable to both sides" (396 U.S., at 155)—the union cannot compel the railroad to accept the proposed change pending exhaustion of major dispute procedures. Far from conflicting, the premises upon which *Shore Line* and the decision below are based are the same.

The legal premises of the decision below are clearly correct, for the statutory *status quo* requirement is a shield to preserve

the *status quo* pending negotiations, not a sword with which to destroy it in advance of negotiations. Thus, the statutory *status quo* provisions expressly freeze "established practices" and "the conditions out of which the dispute arose" (in this case, the railroad's established practice regarding the discontinuance of assignments). Consistently with the statutory language, the court below held that pending negotiations over proposed changes in the *status quo* a railroad may continue to follow established practices that "at least impliedly serve as if part of the collective bargaining agreement" (Pet. 18)—practices evidencing "some kind of mutual understanding, either express or implied" (Pet. 19). That view of the matter is identical to this Court's in *Shore Line*, where the Court held that the *status quo* requirement prohibited the Shore Line from establishing certain assignments away from Toledo but stated that such assignments would not have been barred "*if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions.*" 396 U.S., at 154. To hold otherwise would mean that conditions that previously were "satisfactorily tolerable to both sides" (396 U.S., at 155) could be changed, and indeed that previously agreed-upon rights could be obliterated, by the mere service of a Section 6 notice proposing that result. In terms of the situation in *Shore Line*, it would mean that if the previous practice was not to make outlying assignments, the railroad could not change that practice over union objection until it had exhausted the "long and drawn out," "almost interminable" (396 U.S., at 149) procedures prescribed by the major dispute provisions of the Railway Labor Act; but if the practice had been to make such assignments, the union could compel the railroad to discon-

tinue the practice immediately, simply by serving a Section 6 notice proposing such a change. The Railway Labor Act is not such a one-way street. As this Court stated in *Shore Line*, "[t]he obligation of *both* parties . . . is to preserve and maintain" the *status quo;* "[o]nly if *both* sides are equally restrained can the Act's remedies work effectively." 396 U.S., at 152-153, 155 (emphasis added).

2. Nor is there any conflict among the circuits. Indeed, petitioner does not claim otherwise. Petitioner does refer to three lower court decisions that allegedly support its position (Pet. 11-13), but those decisions are not in point. In each, the carrier had *changed* or was about to change practices followed in the past and did not claim that its actions were in accordance with past practice. Therefore, each case was like *Shore Line* and unlike this case. Thus, in *United Industrial Workers* v. *Board of Trustees*, 351 F. 2d 183 (5th Cir., 1965), the question was whether a carrier could lease its facilities to another company and discharge all its employees in the face of a demand that it bargain with respect to such action. Prior to the demand, the carrier itself had operated the facilities in question "for many years." 351 F. 2d, at 184. Similarly, in *National Airlines, Inc.* v. *International Ass'n of Machinists*, 303 F. Supp. 1132 (S.D. Fla., 1969), the carrier reduced airplane "taxi" crews from three men to two in the face of a notice proposing an agreement to continue the use of three-man crews, and no claim was made that the carrier had ever before used a two-man crew. And in *Illinois Central R. Co.* v. *Brotherhood of Locomotive Eng.*, 288 F. Supp. 504 (N.D. Ill., 1968), 299 F. Supp. 1278 (N.D. Ill., 1969), *aff'd*, 422 F. 2d 593 (7th Cir., 1970), the carrier required engineers to relinquish the controls of their locomotive in circumstances in which that had never been done before. 299 F. Supp., at 1280. In short, in each of

these cases the union claimed that the carrier had altered the *status quo* by doing something it had not done before. In the present case, in sharp contrast, the UTU claims in effect that the carrier has violated the *status quo* requirements of the Railway Labor Act by *not* discontinuing previous practices. The cases the UTU cites afford no support for such a claim.

3. That leaves for consideration only the application of clear legal principles to the particular facts of this case. In that regard, the UTU suggests in its "Concise Statement of the Case" (Pet. 7), and again at one point in its discussion of reasons for granting the writ (Pet. 9), that the established practice with respect to the discontinuance of unneeded switchtender assignments applied only to assignments that had already been discontinued when it served its Section 6 notice and not to other assignments. But error as to that would involve no issue of general importance and therefore would not constitute a ground for review by this Court; and in any event there was no error. In the district court, the union stipulated that "there has been, over a long period of time, an established practice . . . under which *job assignments* have been discontinued" (emphasis added); that the practice did not require "negotiation, consent or agreement" with the UTU before unneeded assignments were discontinued; and that the practice was "known to" the employees and their union, who did not "object" but instead "acquiesced" in it. (Finding No. 9, Pet. 25.) In addition, the UTU conceded and the district court found that the Depot had discontinued switchtender assignments at Shanties 2, 4, 5, 6 and 8 pursuant to the established practice before the union first decided to seek a change in that practice. (Finding No. 8, Pet. 24-25.) Therefore, the courts below simply took the UTU at its word in deciding the case as they did. It would have been preposterous to conclude

on this record, as the UTU would have the courts conclude, that there was an established practice permitting discontinuance of switchtender assignments at Shanties 2, 4, 5, 6 and 8 but not at Shanty 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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